The Impartial Medical Examiner

A Neurosurgeon's Differences and Agreements with the Industrial Accident Commission

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• **In 147 industrial compensation cases the evaluation reached by a neurosurgeon acting as an impartial medical examiner was compared with the disposition made by the Industrial Accident Commission. There was complete or general agreement in 71 per cent of the cases, pretty sharp disagreement in about 30 per cent.**

In general, the Industrial Accident Commission was more liberal than the neurosurgeon acting as impartial medical examiner.

IN THE Report of Senate Interim Committee to the Senate on Workmen's Compensation Benefits, of 1953, testimony was referred to that seemed to throw doubt on the value and fairness of the impartial medical examiner system. Having acted as an impartial medical examiner on a number of occasions, the author thought it might be of interest to compare the recommendations he had made in the various cases with the final action taken by the Industrial Accident Commission.

One hundred and forty-seven reports were available for review. Officers of the Industrial Accident Commission* provided the folders on these "closed" cases. All that remained was to compare the author's evaluation of each situation with that adopted by the Commission.

Before proceeding with the comparison, several comments may be made that may explain some discrepancies or failures of agreement.

First, the Commission may properly be in possession of information properly not available to the medical examiner. Second, age, earning power, life expectancy in relation to the degree of disability may be taken into account by the Commission. The author did not feel it within the examiner's province to speculate on these factors.

Third, emotional response to the claimant and his condition is, in some instances unavoidable. When one sees an unfortunate wretch, it is almost impossible not to "give him something" anyway, even though his condition is palpably not due to, or aggravated by, injury. Two examples of this will be given later.

Emotional factors enter in another way also: In spite of every effort to be impartial, the personalities and attitudes of an applicant in some extreme cases must sway the examiner or the Commission or both.

In a few of the cases reviewed, the chief question to be answered was only secondarily medical. These were cases in which there was no controversy about the medical status or disability. The problem was to assess the responsibility of two or more injuries for the claimant's condition; one study was requested for the sole purpose of getting the examiner's opinion on the adequacy of a compromise and release already agreed upon. For the most part, however, the questions were medical.

Agreement and disability in the 147 cases in which the examiner's recommendation could be compared with the final action of the Industrial Accident Commission could be classified pretty readily as follows:

1. Pretty complete agreement			71	48.3%
2. General agreement			33	22.6%
(a) Examiner more liberal	10	7.0%		
(b) Commission more liberal	23	15.6%		
3. Pretty sharp disagreement			43	29.2%
(a) Examiner more liberal	14	9.5%		
(b) Commission more liberal	29	19.7%		

Examples appropriate to the first and third headings may be of interest.

1. Pretty Complete Agreement

The case of a 34-year-old machinist presented a problem regarding spinal injury or disease. There was a mass of conflicting medical opinion, largely due, it turned out, to lack of complete medical information. The carrier, supported by its medical reports, sought to avoid some or all of the responsibility on the basis of preexisting disease.

It was necessary for the examiner, through the Commission, to correspond with physicians and a hospital staff in other states, to review local hospital records, to digest a huge medical file and to review a large number of x-ray films. The examiner's report was apparently considered a fair analysis of the situation. In ruling for the claimant the referee read into the "award," verbatim, the examiner's "opinion."

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A second example of another sort of "pretty complete agreement" may serve to help refute one prejudice against the impartial medical examiner system. When the author told a claims attorney that he planned to make the survey here reported, the attorney said, "Go ahead, but it's a waste of time. You'll find the Commission follows your recommendations when you favor the claimant, but not otherwise." That this is not always so is illustrated by the following case (and there are several other examples).

The claimant was a 49-year-old carpenter who had received what appeared to have been a trivial craniocerebral injury several years before our study. His chief complaints were "dizziness; misery in neck; sick at stomach; weakness right arm and hand; ninety per cent loss of sexual power; can't sleep; nervousness; eyes burn in movie." We thought the claimant a true malingerer and thought any sort of a settlement undesirable. The Industrial Accident Commission's ruling was "Take nothing."

2. General Agreement

Illustrations of the second main category do not seem needed in this paper. These are cases hinging on quantitative factors only—in which the examiner thought some settlement or disability rating was in order, and in which the Commission agreed. They are listed as "general agreement" because there was only slight disparity between the examiner's and the Commission's evaluations of the situation. As noted, however, the Commission was more generous than the examiner twice as often as the examiner was more generous than the Commission.

The number of cases classified in the categories "pretty complete agreement" and "general agreement," was 104, or 71 per cent of the total number reviewed.

3. Pretty Sharp Disagreement

More interesting is the third category, comprising 43 cases or about 30 per cent of the total, in which there was pretty sharp disagreement between the recommendations of the examiner and the disposition by the Commission. In this group, again, the Commission was more liberal than the examiner twice as frequently as the examiner was more liberal than the Commission.

3a. Disagreement, Examiner More Liberal

A 35-year-old laborer received a torsion-lifting injury to his back. On abundant objective evidence the examiner made a diagnosis of herniation of a portion of a lumbar intervertebral disk and considered the patient disabled for all but the lightest work. Assuming that an operation or operations would be necessary, the examiner felt that if compromise and release was to be effected it should be for several thousand dollars.

Subsequently, compromise and release was effected for $950 in addition to $98.57 that already had been paid.

A 60-year-old laborer received a craniocerebral injury of some severity in an eight-foot fall to a concrete platform. The history, examination and general evaluation of the case made the examiner feel that the claimant had considerable permanent disability and that he would be able to do only the lightest work in the future.

The compromise and release in this instance was $1,250, which seemed somewhat low to the examiner.

3b. Disagreement, Commission More Liberal

The claimant was a 35-year-old nurse, unmarried, whose buttocks hit a wall after she tripped over a gurney. A number of symptoms promptly developed, some of which vaguely suggested herniation of a portion of an intervertebral disk. A physician she consulted confirmed this diagnosis and told her that an operation would relieve or cure her. When seen by the examiner more than a year after the injury, she had not returned to work, and the examiner's opinion was that the situation was entirely functional and that there was no herniation of a disk. The patient and a vigorous attorney succeeded in wining an operation for her. Herniation was not found. After convalescence there was a compromise and release at $8,500 in addition to $3,297.15 already paid. The patient announced that she intended to continue to be operated upon throughout the length of her spine, until somebody found herniation of a disk.

A 44-year-old woman, divorced, a journeyman electrician, was seen four years after she had received injury to the low back caused by lifting. Radiating pain in the lower extremities led, eventually, to two laminectomies and fusions. No herniation of a disk or other cause of root compression was found at either operation. At the time of this examiner's survey the situation seemed wholly functional and the patient was judged to be able to work. The compromise and release in this case was for $13,000. The examiner thought this quite generous.

Examples of instances in which, possibly owing to emotional factors or the desire of the carrier to dispose of the case, small settlements were made that did not seem justified by actual medical findings, may be of interest.

A 52-year-old former tractor driver had a "crick in the back" that had begun while he was making repairs on the underside of a wagon. The examiner thought the diagnosis was unmistakably amyotrophic lateral sclerosis and reported the situation nonindustrial. The patient's condition made him

a pitiable wretch, however, and a compromise and release of $897.00 in addition to $993.90 already paid, was effected.

In another case there was an allegation of injury to the thoracic spine caused by lifting. There was an abundance of objective evidence of neurological disease and disability. But, as the examiner pointed out, these findings had been recorded in the Stanford University Hospital clinic records two years before the "injury" occurred. The examiner considered the patient's condition attributable to congenital spastic paraplegia and that the situation was not industrial.

But, again, the patient was a miserable spectacle, and it was no surprise to the examiner that, in a hearing, he received, through compromise and release, $1,500 in addition to amounts already paid.

THE FUNCTIONAL ELEMENT

Comments on those cases considered "functional" seem pertinent in connection with this review. But first *functional disease* must be roughly defined. The Fifth Edition of Gould's Medical Dictionary gives this meaning: "Functional disease, a derangement of the normal action of an organ without structural alteration." This is not at all the way in which the word is used by most western physicians. This examiner, and most of his colleagues, use the word to describe a situation in which there is no real disturbance of function, but in which complaints originate, are aggravated, or are prolonged, by a state of mind —such as hysteria, neurosis, psychosis or malingering, whether because of a desire for money or simply a desire to avoid work, or for some more obscure reason.

It does not seem proper for a neurosurgeon to attempt to go further than to use the word "functional" in most instances, and we have usually adhered to this. A few cases (among which the case of the nurse in search of a herniated disk belongs) were recognizable, even by the author, as owing to hysteria. A few claimants would be recognized as malingerers by any competent physician. But in the majority it is the examiner's feeling that the subdiagnosis of the functional state should be a matter for a psychiatrist familiar with industrial cases. This qualification is necessary because young or inexperienced psychiatrists, in the author's opinion, are likely to see a poor, suffering and aggrieved human in every palpable fake.

In the examiner's opinion the situation was chiefly or entirely functional in 39 (26.5 per cent) of the 147 cases. In an additional 12 (8 per cent) the examiner reported that the patients were obvious malingerers. In one instance the patient was thought by the examiner to be psychotic. He was thereafter seen by a psychiatrist and committed to a state hospital. As this nonindustrial situation probably would have been apparent to a layman, the examiner felt justified in making the diagnosis.

Probably it is equally unwise for a neurosurgeon to try to identify the origins of the functional states. Psychiatric investigation of a patient's resentment, for instance, might show that he had long been resentful of everything; that the apparent cause of resentment and hence a functional state lay within the patient's own constitution or surrounding life. But it may be justifiable for the neurosurgeon to mention what appeared, superficially, to be responsible for the functional state in some instances:

Desire for Gain

This is quite easily recognizable in malingerers. In another functional group the desire for gain may not be apparent to the examiner, attorneys, the referee or to the patient himself. In such cases the claimant does not recover immediately, once a settlement is reached. In reviewing the records, however, it was apparent, through termination proceedings, to determine that recovery, over a period of several months, did follow, in long-standing situations, when satisfactory financial arrangements were made.

Patient's attorneys are most likely to be misled in this regard, and are likely—sincerely and honestly, it seems—to make statements to the effect that "anyone can see that the woman is disabled; all you have to do is look at her." Unfortunately, it is not that simple. Characteristically these claimants start out by saying, " It's not money I want; I want to get well! No amount of money would pay for what I'm going through."

Self-Justification

Some patients persevere in their functional position not because of a desire for gain but in the hope that it finally will be proved to the world that they were badly injured and that they did and do have great suffering.

Resentment

Resentment over some aspect of a patient's course after injury appears, to the author, to be the commonest source of a functional state. Resentment, in turn, may be due to a number of factors. Those noted most frequently in the cases reviewed were as follows:

Treatment by employer. Many employers do not recognize that the medical evaluation of a real or alleged injury is not within their province. A case in point is that of a 25-year-old negro laborer whose story (which could not be verified because of the lapse of time, although it has not been denied) was as follows: He stopped work the day he injured his back and reported the injury. When he refused to go

back to work, he was promptly ejected from the plant by a guard conspicuously armed. He spent the remainder of the night unsuccessfully seeking admission to various east bay and San Francisco hospitals.

The functional state in this individual, apparently engendered by resentment in connection with this episode, has cost the carrier several thousand dollars and will cost additional thousands in the future, in this examiner's opinion.

Management by carrier. A functional state resulting from resentment over management of a case by an insurance company is illustrated by the following. This story was verified, or at least brought out and not refuted, in a subsequent hearing before the Commission. A 32-year-old female cook received minor laceration of a thumb, and pain, tenderness and swelling of the thumb followed. In the succeeding four months the thumb was twice operated upon for purposes of drainage. Still having pain, the claimant asked the carrier for a change of physicians. The claims representative told her to return to the original physician for a period of two weeks, and "At the end of that time we'll know whether to give you a million dollars, kick your butt or continue treatment."

These words burned themselves into the patient's mind and into the case history and, in this examiner's opinion, needlessly complicated recovery and added greatly to the expense of disposition.

One functional state is believed to be based on unjustified resentment. Some patients, having received excellent medical care at the hands of the carrier, bemoan the fact that nothing is being done for them, when, as far as could be determined, everything within the bounds of prudent medical management had been done. Other patients in this group seem unable to understand the limits of the responsibilities of the carrier and the Industrial Accident Commission.

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***Discussion* by EDWARD O. ALLEN, San Anselmo**

Dr. Fender has asked the writer, who before his retirement in 1947 had many years of service with the Industrial Accident Commission of California as referee, attorney and Commissioner, to present a background to the doctor's personal conclusions relative to the functions of a neurosurgeon as impartial medical examiner appointed in specific cases by order of the Commission. Dr. Fender seems sometimes to feel at a loss as to how the Commission arrived at conclusions differing from his own, in view of the record in the case.

There has been often voiced, particularly by representatives of injured workmen, emphatic dissatisfaction with the system of appointing, through the machinery of the Commission, specialists in the branch of medicine appropriate to the case under trial, who should examine both the injured claimant and the relevant record, and render an opinion on the nature and extent of disability resulting from the injury as well as a prognosis and recommendations regarding further treatment and medical handling.

The conclusions expressed by its appointee naturally bear great weight with the Commission, but the critics insist that the merits of the injured person's claim as to his disability should be passed on by the official actually hearing the evidence, including testimony and reports of the physicians of each party to the case, and the judgment should be rendered by that official uninfluenced by the opinions and advice of strangers to the actual testimony and proceedings, no matter how eminent. Another objection expressed is on the ground that the examiner is influenced, unconsciously or not, by knowing that his fee usually comes indirectly from the employer's side of the case, although formally paid by the Commission. A brief historical background may be appropriate, as to how the Commission arrives at its conclusions.

It should be remembered that it was thought and planned in the beginning of the Industrial Accident Commission's history, 40-odd years ago, that the proceedings of that body should be "administrative" in character, and that rough but sympathetic justice should be rendered injured employees "around a table," with dispatch and without the complications and technicalities inherent in court proceedings. Nevertheless actual experience eventually showed that—although not called so—the Commission was actually a "court" and as such is subject to limitation and procedural requirements arising from the state and federal constitutions and laws.

Amongst such is "due process of law," from which follows the right of each disputing party to be heard and to be presented with the other's evidence, along with the right of cross-examination; and there follow also the rules of evidence and the rules governing conclusions reached by the judge, and the like. Under this head there arises the controversy as to right of the Commission to appoint, within its own judgment, a presumptively impartial expert to advise the Commission where the parties' testimony is contradictory or, in the tribunal's opinion, is inadequate for a well-founded decision.

Since the Commission, as a court, is in effect on a level with the Superior Court, or general civil trial tribunal, it would seem equally entitled to appoint medical examiners in the same circum-

stances as the Superior Court is allowed to do, under a statute enacted in recent years.

It is also contended that the findings and opinion of the attending physicians should be paramount in the body of the medical evidence. The opposite contention, that the case should be decided by the hearing officer receiving only the testimony offered by the parties and making his own appraisal as to weight and degree of honesty of the evidence, is not in accord with the prevailing philosophy calling upon the Commission to make the necessary enquiries to develop the true facts and the causes of claimed disability.

Aside from its judicial duties of rendering decisions as between the injured employee or dependents and the employer or his insurance carrier, the Commission has functions which are genuinely "administrative" in character. Since first operating, the Commission has set up a Medical Department, designed not only to examine injured employees who appear informally seeking advice or desiring a rating for permanent industrial injuries, or informally to evaluate medical bills and the like, but also to act in an advisory capacity to the Commission itself.

In actual practice in judicial cases the trial officers as well as the Commissioners often resort to the staff of the Medical Department to learn the meaning and significance of medical terms and the nature and industrial causes of disabilities which are the subject of controversy in a formal case, as well as the merits of written medical reports received in evidence. The judgment of the Medical Department that the case calls for an impartial medical examination often eventuates in the appointment of such an impartial examiner, and almost invariably the appointment of the examiner is made on the department's recommendation as to the particular expert to be appointed.

The embarrassment as to "due process" lies in the fact that the personal contacts for the above purposes between the judicial officer and the department physician are not made a part of the record, and the parties to the case in hand are not necessarily advised of the extent to which the ruling of the judicial officer is influenced or based on the informal advice given him by the physician—all in good faith, of course.

Moreover, since the Commission has no allowance for paying the fee and laboratory expenses of the examiner, none can be appointed unless one of the parties agrees to pay him, and the usual upshot is the agreement of the employer or insurance carrier to bear the costs.

Although the Commission for a time after its formation 40-odd years ago endeavored to make decisions in cases where a Commissioner presided over the hearing, it was soon found that claims were too numerous to permit a Commissioner to preside personally, and a system was adopted of employing referees, qualified as lawyers, to hold the hearings and take the testimony, the transcript whereof would be studied and reviewed at headquarters. In due course the cases again became too numerous, so the referees were given the authority at first to recommend a decision to be approved or the opposite and later actually to sign decisions, most of which would receive official approval *pro forma.*

The testimony is always taken down by a shorthand reporter, but not transcribed unless a party requests and pays for the transcript, although the Commission sometimes orders a transcript for its own information and review. But the referee always accompanies his decision with a report of the substance of the testimony as noted by him, and a memorandum of the reasons why he arrived at the decision. It should be particularly noted that medical testimony for the most part is not oral at a hearing, as in the civil trial courts, but consists of unsworn written reports currently prepared by the attending and consulting physicians of the defendant employer or insurance carrier and of such physicians or consultants as may be engaged on behalf of the claimant.

Perhaps 90 per cent of the tens of thousands of industrial accidents never reach the Commission as formal claims, although the employer and the insurance carrier retain the medical record in each case. The remaining approximate 10 per cent arise mostly from dissatisfaction of the injured employee at the outcome of the treatment furnished him, and he may decide to resort to his own physician or trust to the judgment of the Commission. Oral testimony of physicians at a formal hearing is not the rule, but sometimes one or both of the parties deem such oral appearance desirable in order to emphasize his physician's conclusions or to render clear what is usually a complex or abstruse medical contention as to the nature and cause of the claimed disability.

The principle of "due process of law" requires that an impartial medical examiner may be cross-examined orally on the witness stand, although the party producing him must pay the appropriate witness fee as in any other case of medical testimony. The litigated ten per cent of injuries above referred to of course includes all the other causes of action outside the medical and disability field, such as jurisdiction, compensability in law, dependency, and the like.

Some critics of the present examiner system contend that the fair and just method of reaching conclusions as to the nature, extent and cause of disability should be an official Medical Department

staffed with sufficient physicians of the various specialties, who are prepared to examine all claimants, whether injured employees appearing informally or as formal parties to a case, like the medical departments operated by the commissions of some other states. In practice this, in the long run, would tend to repose the decision as to disability and cause in the medical group rather than in the referee or commission, and the question would always remain as to the adequacy of the examination and medical examiner's survey of the record, and the capability of the doctors, whose monetary compensation would in the main be similar to that of a general practitioner. Budgetary considerations also enter in.

Realistically, it seems to be conceded by those in the work-a-day world of workmen's compensation that the present system of passing judgment on a workman's claim regarding his disability attributable to industrial injury is as effective and as just as human infirmity permits. It is the observation of the writer over three decades of close connection with industrial injury matters in California that the work of the impartial medical examiners has contributed in an important degree to this result. They have almost without exception been truly impartial, painstaking and conscientious, animated by a spirit of civic service, and of course skilled in their specialties and in their judgment in probing the obscurities of medical phenomena.

On the other hand the commissioners and referees were chosen for qualities quite other than the knowledge and understanding of medical problems and medical terminology and ways of thought. The referees through long contact with many contested cases involving recurrent types of disabilities have absorbed considerable medical knowledge, but not enough to make decisions (as some insist they should do) without the best of advice. How, within the pressures of litigation and administration of complicated variety and magnitude, can the Commission and referees do otherwise than they have done, with regard to disability problems, without a little stretching of "due process"?

The specialty which Dr. Fender follows, neurosurgery, is probably called upon for appointments as examiner more frequently than other specialties, for the reason that back injuries occur often and present difficult and obscure forms for analysis. When the genus homo evolved into the biped, nature did not quite adjust the quadrupedal bones of his spine and pelvis. Long ago, when the railroads were king, their claims departments always had a perplexing time with the then entitled "railway spine," and the difficulty still persists. With the best of good faith, experts differ amongst themselves as to the extent of bodily damage to the spine inflicted by injury, when the "personal equation" of the patient is taken into account, and the condition of the interior structures of the body can not be fully ascertained by the most ingenious techniques of modern medical science.

Where the physician reporting for or put on the witness stand by the claimant expresses findings and opinions contradicted or much modified by those of the defendant—and usually the latter have administered the treatment from the beginning of the case—it is certainly mandatory to place the problem in the hands of a disinterested expert, whose sound judgment, backed by extended experience, as well as his examination of the patient and a study of the entire record and testimony, should prevail unless convincing considerations otherwise are shown.

Dr. Fender's article discusses what he calls the "disagreement" between his own conclusions and the Commission's decisions which awarded or denied compensation where the examiner's recommendation if followed would have resulted in the opposite award. Except in the earlier years it has been the Commission's rigorous policy not to put into the record anything in writing expressing their reasons for reaching a decision. The referees on the contrary are expected to discuss in the record the considerations which prompted them to recommend a decision which they deem just and in accord with the evidence. Certain types of cases (very often including those needing an examiner) automatically go to the Commission for decision, and in a material percentage the referee's recommendation is reversed.

In the absence of a memorandum of the Commission it is guesswork to deduce the animating reasons, and "disagreement" with the examiner's conclusions may not necessarily enter in. The referee's memoranda in the case may throw light on the reasons, but it should be remembered that the staff of referees is quite numerous, and they naturally differ in their slants of thought and personal equations, and where substantially identical circumstances of fact and testimony, but in separate claims, are presented to two referees the respective decisions may be opposite in essentials.

It was observed by the writer as time went on in his service that there occurred little or no personal oral discussion of the cases between the Commission and the respective referees; and oral argument by the attorneys, although it is the rule in the civil courts, was banned before the Commission. The Commission learns of the case before it only from written memoranda, petitions or briefs, and from occasional transcripts of testimony including the written medical reports.

The explanation for the above situation is largely the vast number of claims flooding a tribunal of quite limited membership, and still governed by the tradition that it is an "administrative tribunal" and

not a court determining property rights under a statute granting to employees monetary benefits taken from the employers.

Dr. Fender discussed at considerable length the important matter of *settlements*, which are permitted by statute, whereby upon approval of the Commission the employee agrees to receive and the defendant to pay a fixed sum of money with a complete release of further liability by reason of the injury in question. Some state commissions have the practice of using this method of concluding a controverted claim to a much greater extent than in California, although here it is quite frequently resorted to where genuine doubt arises as to the extent of disability and the prognosis, or as to compensability in law, or where the effect of settlement and its payment is expected to have a therapeutic effect on the mind of the claimant.

Back injuries lend themselves readily to a neurotic, or "functional," disability and the services of an examiner are of great value in the determination of the question whether or not the disability is of this character, and of how to handle it. Since early in its history the Commission has approved settlements of this sort, on eminent medical authority that a neurosis, or other psychological irregularity, can be relieved upon a payment which satisfies the mind of the claimant.

Since it is sometimes the case that this expectation is not realized, that the disability continues, and a reopening of the order approving the settlement is open to legal and other difficulties, the Commission once devised a form of what it called "a gentlemen's agreement" whereby the defendant in a separate document, kept secret from the neurotic and his attorney, agrees to reopen the case voluntarily if the settlement has not effectuated the expected cure. This procedure has fallen into disuse, since one school of attorneys representing claimants apparently distrusted the gentlemanliness of the other side, or at any rate secrecy was hard to maintain.

It would be of great value to the work of the Commission and to the medical profession in general, as well as to civil practice for damage claims, if a systematic follow-up of approved compromised claims in compensation could be established and there could be compiled statistical information on the sequels of all cases of traumatic neurosis, thus affording information as to the success and failure of this "settlement" mode of therapy. The Commission at one time was about to inaugurate such a system and employ investigators, but an economy urge in one of the incoming state governors put a stop to it in the budget. (The writer, in several cases of alleged traumatic neurosis, where as referee he urged settlement which was approved, happened to learn by accident long after the case was concluded that there was full and permanent recovery to normal after the payment of the compromise.)

Dr. Fender is to be thoroughly commended for compiling his personal information on the cases he has handled as examiner, and his conclusions should be of great value to those involved in similar matters. It is hoped and urged that those physicians, in all branches of medicine, who are and have been called upon for service as examiner would join Dr. Fender in similar reports, thus creating a compilation of factual information of inestimable value in improving the methods of ascertaining the correct compensation and care for disabilities resulting from industrial accidents.